

REVIEW OF STANDARDS FOR THE SAN FRANCISCO BAY/
SACRAMENTO-SAN JOAQUIN DELTA ESTUARY

May 16, 1994

Comments of:

East Contra Costa Irrigation District
North Delta Water Agency
Reclamation District No. 999
Reclamation District No. 2068

East Contra Costa Irrigation District ("ECCID"), North Delta Water Agency ("NDWA"), Reclamation District No. 999 ("RD 999"), and Reclamation District No. 2068 ("RD 2068") (collectively, the "Delta Purveyors") submit these comments in response to the Notice of Public Workshop to review and revise water quality standards for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary that was issued on April 15, 1994 by the State Water Resources Control Board ("SWRCB").

The April 15, 1994 Notice of Public Workshop requested comments as to the "[e]ffects of Bay-Delta diversions on beneficial uses, including diversions other than the Central Valley Project (CVP) and the State Water Project (SWP)." Specifically, the Notice stated that "[d]iversions throughout the Bay-Delta Estuary are cited as partial causes of the decline of some beneficial uses. The SWRCB requests the participants to submit the most current information on this issue."

As a threshold matter, the Delta Purveyors dispute the Notice of Public Workshop's characterization of this issue. The Delta Purveyors are aware of no evidence linking their

diversions of water to the precipitous decline of the ecosystem of the Bay-Delta Estuary that has occurred since the mid-1960's.

Furthermore, there are two reasons that it is highly unlikely that the Delta Purveyors' diversions have contributed in any significant manner to the decline of the Bay-Delta Estuary's ecosystem. First, the Delta Purveyors have, as a group, diverted the same amounts of water for 70 to 75 years. It is inconceivable, therefore, that these diversions are in some way responsible for the collapse of the Bay-Delta Estuary's ecosystem during the past quarter century. Second, the Delta Purveyors' diversions are entirely consistent with the historical operation of the Bay-Delta Estuary as a "leaky reservoir." Although a number of factors are thought to have influenced the decline of the Bay-Delta Estuary -- including the introduction of exotic species, over-fishing by commercial fleets and by individuals, and pollution of the Estuary by industrial uses -- to the extent the decline of the Bay-Delta Estuary may be related to water use, it is the state and federal projects, not diversions by the Delta Purveyors, that are the cause of such decline.

1. The Delta Purveyors Have, In General, Diverted the Same Amounts of Water for Seventy Years

The Delta Purveyors collectively hold riparian rights, pre-1914 appropriative rights, and post-1914 appropriative rights to divert water from channels in the Bay-Delta Estuary and from the Sacramento River. In addition, the Department of Water Resources (the "Department"), by means of contracts with NDWA and ECCID, undertook in 1981 to guarantee that the Delta Purveyors would be able to divert water of a specified quality for

reasonable and beneficial uses.¹ Detailed summaries of the Delta Purveyors' water rights were presented to the SWRCB as WRINT ECCID Ex. 11, WRINT RD 999 Ex. 11, and WRINT RD 2068 Ex. 11 and are incorporated herein by reference as if set forth in full. Copies of the contracts between NDWA and the Department and between ECCID and the Department were introduced as evidence during Phase I of the Bay-Delta hearings on page 198 of the transcript of proceedings as NDWA Exhibit 1 and ECCID Exhibit 1 and are incorporated herein by reference as if set forth in full. As set forth in the water rights summaries, the appropriative water rights held by the Delta Purveyors were largely acquired before either the state or federal projects were constructed. Specifically:

- a. ECCID diverts water pursuant to a pre-1914 appropriative right from Indian Slough.
- b. RD 999 diverts water pursuant to riparian rights, pursuant to pre-1914 appropriative rights, and pursuant to post-1914 appropriative rights. All of the post-1914 appropriative rights, which entitle RD 999 to divert a total of approximately 290 cfs from May through October, have priority of 1924 or earlier.
- c. RD 2068 diverts water pursuant to post-1914 appropriative rights from Haas Slough and the Dixon Drain. RD 2068 diverts 200 cfs from Haas Slough for summer use under an appropriative right with priority dated 1921. RD 2068 also diverts 42 cfs from Haas Slough for winter use with priority dated 1960. RD 2068 lastly salvages tailwater from upstream irrigators in the Dixon area. This last appropriative right does not constitute a diversion from the Delta.

The evidence indicates that these historical diversions did not adversely impact fish populations. The concerns expressed on behalf of fish and wildlife have arisen since the operation of the state and federal projects altered the way in which the Delta operates. There

¹ RD 999 and RD 2068 are both located within the boundaries of NDWA and so are beneficiaries of the agreement between NDWA and the Department.

has been no significant difference in the quantity of water used by the in-Delta diverters in approximately the last seventy years.

In addition, both the contract between NDWA and the Department and the contract between ECCID and the Department acknowledge that, in the words of the NDWA contract:

The construction and operation of the FCVP [federal Central Valley Project] and SWP [State Water Project] at times have changed and will further change the regimen of rivers to the Sacramento-San Joaquin Delta (Delta) and the regimen of the Delta channels from unregulated flow to regulated flow. (NDWA Contract, Recital (d)).

Accordingly, the Department undertook to assure NDWA and ECCID of water of a dependable water supply of adequate quantity and quality for agricultural uses. Again quoting from the NDWA Contract:

The State [of California] recognizes the right of the water users of the Agency to divert from the Delta channels for reasonable and beneficial uses for agricultural, municipal and industrial purposes on lands within the Agency, and said diversions and uses shall not be disturbed or challenged by the State as long as this contract is in full force and effect.

By means of this provision, the State of California is estopped from disturbing or challenging reasonable and beneficial uses of water by the Delta Purveyors, and is required to provide water to the Delta Purveyors in the event of water deficiencies. Accordingly, even if the SWRCB were to find that the Delta Purveyors had contributed to the decline of beneficial uses in the Bay-Delta Estuary, the SWRCB should recognize that the contracts between NDWA and ECCID and the Department shift the burden of mitigating for any such impact to the Department.²

² Similarly, the area of origin laws (e.g., Stats. 1927, ch. 286; Stats. 1933, ch. 1042; Stats. 1959, ch. 1766; Stats. 1984, ch. 1655) subordinate any water rights acquired in the Bay-Delta Estuary for export to the needs of beneficial uses, including fish and wildlife,

2. The Delta Purveyors' Diversions Are Consistent with the Historical Operation of the Bay-Delta Estuary

It is well-established that, before construction of the state and federal projects, the channels of the Delta functioned as a "leaky reservoir." Historically, this "reservoir" was filled by winter and spring flows which flushed the Delta of intruding salinity. In most years, the runoff from the Sacramento and San Joaquin Rivers pushed the salinity line well out into Suisun Bay and beyond. Delta water users then gradually depleted this reservoir during the growing season, which resulted in the slow intrusion of salinity from San Francisco Bay. The delayed impact of this salinity intrusion meant that in most years adequate water was available for irrigation until nearly the end of the irrigation season, even in the most critical years.³

With the construction of upstream reservoirs, however, the Delta channels no longer store the water needed to repel salinity entering the Delta from San Francisco Bay. The release of such stored water during June, July, August and September, however, has had essentially the same effect as the water that was previously stored in the Delta channels; such releases effectively limit the intrusion of saline water into the Delta. In addition, such releases have a beneficial impact on the temperature of the Sacramento River.

in the Estuary.

³ Indeed, it is possible that the Delta (at least the lowlands) would use approximately the same amount of water whether or not irrigation were conducted, due to the intrusion of the sub-flows which exist throughout the Delta. Delta lowland islands with elevations below 5 feet mean sea level would fill up with seepage water if they were not being constantly pumped for drainage.

Construction and operation of the export pumps, however, transformed the Delta from a leaky reservoir into a diversion channel or river flowing in the direction of the pumps. It is these reverse flows (and the consequent deterioration of the hydrologic barrier) that have allowed increased salinity intrusion and played a principal role in the decline of the Bay Delta Estuary's ecosystem. The Delta Purveyors are in no way responsible for this result.

In answer to the question posed by the Notice of Public Workshop, therefore, the Delta Purveyors' diversions of water from the Delta have not had a material adverse impact on beneficial uses of water in the Delta.

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